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IN THE

Supreme Court of the United States

October Term, 1979

THE UNITED STATES OF AMERICA and
THE CROW TRIBE OF INDIANS, MONTANA,
Respondents,

vs.

THE STATE OF MONTANA, MONTANA STATE FISH AND GAME COMMISSION, JOSEPH H. KLABUNDE, SPENCER S. HEGSTAD, EARL L. SHERROW, JR., ALFRED L. BISHOP and PAUL B. TIHISTA; BIG HORN ROD & GUN CLUB; and CITIZENS RIGHTS ORGANIZATION,
Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICI CURIAE STATE OF MINNESOTA and MINNESOTA COUNTIES OF BECKER, BELTRAMI, CASS, CLEARWATER, KOOCHICHING, LAKE OF THE WOODS, MAHNOMEN and PENNINGTON

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INTEREST OF AMICI CURIAE

The State of Minnesota and Minnesota Counties (hereafter "State" and "Counties") have a particular interest in the issue presented in this case of whether an Indian tribe has the exclusive authority to proscribe or regulate hunting and fishing by non-Indians on non-Indian owned fee land within an "open" reservation. The interest goes beyond the fact that there are eleven Indian reservations currently recognized by the Department of Interior within Minnesota, encompassing over two million acres of land. The State and three of the Counties (Becker, Clearwater and Mahnomen) are at present the defendants in a lawsuit[1] in which the White Earth Band of Chippewa Indians is seeking exclusive hunting and fishing jurisdiction over all lands within the 1867 White Earth Reservation, an area which is now over 90% non-Indian owned and in which non-Indians outnumber Indians by over two to one. The other *amici* Counties are either on or near other Indian reservations within the state which may be influenced by the results of the present appeal.

The results in *United States v. Montana* will obviously have substantial impact not only on the pending litigation in Minnesota but also on anticipated future litigation. Therefore the State and Counties wish to participate in a limited fashion here and make some of their views known at this time. Also, to the extent the history and treaties of Minnesota's reservations differ from those of Montana, the State and Counties wish to emphasize that a detailed case by case analysis of the facts and history of each affected reservation is required when courts are analyzing congressional intent and jurisdictional disputes between States and Indian Reservations. *See, e.g.,*

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[1] *White Earth Band of Chippewa Indians v. Robert L. Herbst, et al.*, Civ. No. 3-74-63 (D. Minn.).

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); *De Coteau v. District County Court*, 420 U.S. 425 (1975).

SUMMARY OF ARGUMENT

The court below held that the Crow Tribe could proscribe or regulate all hunting and fishing by all non-resident non-members anywhere within the reservation. The court also held that resident non-members could not be prohibited from hunting and fishing on their own land, but that such activities were still subject to tribal regulation.

The court below found authority for such tribal regulation generally in two ways. The court first cited the Treaty of 1868 (15 Stat. 649). The 1868 treaty preserved territory for the absolute use and occupation of the Crow Indians and ostensibly barred anyone without authority from entering the reservation.[2] The court found that the authority to exclude non-Indians from reservation lands included the authority to regulate the hunting and fishing activities of non-Indians on non-Indian lands. The second rationale apparently used by the court below was the notion that the Tribe had inherent sovereignty which gave it the authority to regulate non-members who enter the reservation to hunt and fish. The Respondent Crow Tribe asserted a third rational which the court below did not address specifically. The Tribe argued that since its right to hunt and fish was termed "exclusive," it follows that the Tribe has the sole authority to license that right to all people on all lands within the reservation. *See* Brief for the Crow Tribe in Opposition to Petition for Writ of Certiorari at 14.

It is the position of the State and Counties that none of these asserted authorities allows the Crow Tribe or other similarly

[2] 604 F.2d at 1166-1167.

situated tribes to proscribe or regulate hunting or fishing by non-Indians on non-Indian lands within reservation boundaries. Specifically, it is the position of the *amici* State and Counties that: (1) the Crow Indian Tribe does not have the inherent authority to regulate non-Indian activity on non-Indian owned lands within the reservation because such authority was relinquished as a result of the tribe's dependent status; (2) a close analysis of relevant authorities reveals that any generally recognized tribal power to exclude extends only to Indian-owned lands within a reservation and that in the instant case Article 2 of the pertinent treaty (Treaty of May 7, 1868, 15 Stat. 649) is not, because of the rationale of *Puyallup Tribe, Inc. v. Department of Game of Washington*, 433 U.S. 165, 174 (1977), satisfactory authority for the regulatory power recognized by the court below; and (3) the "exclusive right" claimed by the Crow Tribe is also not, because of the rationale of *Puyallup Tribe, Inc.*, satsifactory authority for the ruling of the court below. Finally, it is the position of the *amici* that, even assuming a tribe otherwise retained the authority to regulate non-Indian hunting and fishing, an examination of the purposes and policies underlying the enactment of the 1887 General Allotment Act (24 Stat. 388) and other special allotment acts including the 1920 Crow Allotment Act (41 Stat. 751) makes it clear that Congress did not intend non-Indians coming on a reservation to be subject to tribal regulation on non-Indian owned land. It is important to recognize that the State and Counties do not contest the proposition that the Crow Tribe may prohibit or regulate hunting and fishing by non-Indians on *Indian-owned* lands within the reservation.

ARGUMENT

I. THERE IS NO INHERENT TRIBAL AUTHORITY TO REGULATE HUNTING AND FISHING BY NON-INDIANS ON NON-INDIAN LAND.

The court below apparently based its decision at least partially on a perceived "inherent authority" on the part of the Crow Tribe to regulate hunting and fishing by non-Indians on non-Indian land. This view conflicts with the recent decisions of this Court in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) and *United States v. Wheeler*, 435 U.S. 313 (1978), and does not find support in the "tradition of sovereignty" of the Crow Tribe. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 48 U.S.L.W. 4668, 4679-4682 (1980) (Rehnquist, J. concurring and dissenting).

In Oliphant, of course, this Court found that Indian tribes do not have criminal jurisdiction over non-Indians absent an affirmative delegation of such power by Congress. 435 U.S. at 208. As the Court in that case recognized, "Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers 'inconsistent with their status' . . ." *Id.* (citation omitted) (emphasis in original). In *Wheeler*, the Court further explained that the incorporation of the Indian tribes "within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised." 435 U.S. at 323. Thus, the Court stated that the tribes retained only those aspects of sovereignty "not withdrawn by Treaty or Statute, or by implication as a necessary result of their dependent status." 435 U.S. at 323.

This Court determined in *Oliphant* that as a result of their dependent status, tribes necessarily gave up their right to exercise criminal jurisdiction over non-Indians. 435 U.S. at 208-11. Similarly here, Indian tribes as a result of their dependent status relinquished the right to exercise civil jurisdiction over non-Indians who hunt and fish within the reservation—at least on land no longer in Indian ownership—absent some sort of an affirmative delegation from Congress. As was pointed out in *United States v. Wheeler*,

> The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe *and nonmembers of the tribe*. . . .
>
> These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to *determine their external relations*. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. *They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a Tribe's dependent status.*

135 U.S. at 326 (emphasis added). Significantly, it appears that the shared assumption among the executive and legislative branches of the federal government, at least with regard to tribal regulation of non-Indian hunting and fishing, was that Indian tribes do not have the inherent authority to so regulate. *See e.g.* H. R. Rep. No. 625, 86 Cong., 1st Sess. (1959), at 2, 4 (letter of the Asst. Secy. of the interior); S. Rep. No. 1686, 86 Congress, 2d Sess, (1960) at 2, 4 (letter of the Asst. Secy. of the Interior). This "shared assumption" is further demonstrated by the fact that it was consistently

recognized by the judicial and executive branches that tribes do not have the inherent authority to exercise civil jurisdiction over non-Indian non-members absent their consent. *Cowan v. Rosebud Sioux Tribe*, 404 F. Supp. 1388, 1342 (D.S.D. 1975); 7 Op. Atty. Gen. 174 (1855); II *Opinions of the Solicitor of the Department of the Interior* at 1742 (Memorandum of Solicitor, dated July 26, 1956); *Powers of Indian Tribes*, 55 I.D. 14, 56-64 (1934). *See also Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Namen*, Civ. No. 2343, Memorandum Decision at 44-50 (D. Montana, September 19, 1979); *Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, 77-882M, Order at 6-7 (W.D. Wash. July 27, 1978). *See generally* Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 55 Wash. L. Rev. 479, 513 & 515 (1979).

This analysis is supported by the fact that the exercise of tribal sovereignty in this instance would be inconsistent with the overriding interests of the National Government, recognized in *Oliphant*, 435 U.S. at 210, that U. S. citizens be protected from unwarranted intrusions on their personal liberty. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 48 U.S.L.W. at 4673. Although not as dramatic as in the area of criminal law enforcement, civil regulatory enforcement may nevertheless involve such intrusions. Therefore, as with criminal jurisdiction, the tribes by submitting to the overriding sovereignty of the U. S. gave up the general power to exercise jurisdiction over hunting and fishing by non-Indians since, as pointed out in *Oliphant*, 435 U.S. at 210, "Indian tribes were characterized by a 'want of fixed laws [and] of competent tribunals of justice.'" (Citation omitted.) Moreover, because the lands involved are not Indian owned, this is not an area in which a tribe traditionally has a signifi-

cant interest. *See Washington v. Confederated Tribes of the Colville Reservation*, 48 U.S.L.W. at 4673.

The import of the foregoing is clear. Because the regulatory authority advocated for the tribes here involves non-Indian activity on non-Indian owned lands, this power pertains to the tribe's external relations and has therefore been lost as a necessary result of the tribe's dependent status.

Further, the State and Counties recommend that the "inherent authority" of the Crow Tribe be analyzed in a manner similar to that set forth by Mr. Justice Rehnquist in *Washington v. Confederated Tribes of the Colville Reservation*, 48 U.S.L.W. 4668 (1980). Such an approach entails examining the "tradition of sovereignty" with regard to the tribal regulation of non-Indians on non-Indian lands. The tradition, the State and Counties believe, on the Crow Reservation and elsewhere will indicate that the tribal regulation of non-Indians on non-Indian land has not been historically accepted or exercised.[3] After the "tradition" has been examined, it will be appropriate to review relevant treaties and statutes to determine whether Congress expressly altered that tradition. If Congress did not so alter the traditional concepts, and *amici* believe that there is nothing in the Crow situation to indicate that Congress did, then the Court should not grant the tribe civil jurisdiction over hunting and fishing by non-Indians on non-Indian land.

In any event, the ambiguous rationale of the court below should not be accepted. More than anything else the opinion

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[3] To the contrary, the district court found in the present case that the State of Montana has regularly exercised its jurisdiction over non-Indians hunting and fishing on non-Indian land, and that the preponderance of evidence supported a conclusion that the Tribe did not regularly exercise any jurisdiction over non-Indians. 457 F. Supp. 599, 609-610.

below reflects a philosophy that the court should in effect legislate what it considers to be a "reasonable" solution when, in the court's words, "legislative or executive solutions are unlikely to be offered within the reasonable foreseeable future." 604 F.2d at 1172. The difficulty with such an approach (*i.e.* not using a definite and consistent legal framework for analysis) is that there is no consistency to legal results. Different courts will have different "feelings" about what is a reasonable legislative solution to a particular problem. The court below simply tried to legislate Indian policy. Its attempts may have been motivated by high ideals, but its approach was not in accord with the principles which prevail in the field of Indian law. As was pointed out by this Court in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615, "our task here is a narrow one . . . [W]e cannot remake history."

In conclusion, the court below erred in finding tribal regulatory authority in this case by ambiguous references to Indian sovereignty or inherent rights. The analyses set forth in *Oliphant, Wheeler,* and *Washington v. Confederated Tribes* are the correct ones which should determine the result here, a result which should be different than that reached by the court below.

II. THE COURT-CITED AUTHORITY TO EXCLUDE NON-INDIANS FROM RESERVATION LAND DOES NOT EXTEND TO NON-INDIAN OWNED LANDS.

Although tribes may no longer have the inherent authority to regulate non-Indian activity, there may nevertheless be other rights retained by Indian tribes which empower them to prohibit or regulate hunting and fishing by non-Indians on non-Indian owned lands within existing reservations. The

court below apparently based its holding at least in part on the Crow Tribe's power to exclude non-Indians from entering the reservation. *See e.g.*, Brief for the Crow Tribe in Opposition at 15. A close examination of the relevant authorities, however, reveals that any power to exclude non-Indians extends only to Indian-owned lands within the reservation, unless there is a treaty provision of federal law which expands that power.

It is pointed out in the Department of Interior publication *Federal Indian Law* (G.P.O. 1958) at 438 that the law respecting the power of tribes to exclude non-members from their reservations "is clearly stated in a series of authorities running back to the earliest days of the Republic. . . ." *See, e.g.*, 1 Op. Atty. Gen. 465 (1821); 18 Op. Atty. Gen. 34 (1886). *See also Worcester v. Georgia*, 6 Pet. 515, 561 (1833); *Maxey v. Wright*, 3 Ind. T. 243, 58 S.W. 807, 809 (1900), *aff'd* 105 F. 1003 (8th Cir. 1900). What is significant about these early authorities is that the power to exclude is linked to the occupancy or possession of the lands by the Indian tribe. Thus, as early as 1821, the United States Attorney General recognized that "[s]o long as a tribe exists and *remains in possession of its lands, its title and possession* are sovereign and exclusive; and there exists no authority to enter upon their lands, for any purpose whatever, without their consent. . . ." 1 Op. Atty. Gen. at 466 (emphasis added). These principles were again stated by the Attorney General in an opinion issued in 1884. *See* 18 Op. Atty. Gen. at 36-37. *See also Maxey v. Wright, supra*, in which this 1884 Attorney General's opinion is quoted favorably. Thus, it is apparent that the common theme among the earlier authorities respecting the power to exclude was that that power was based upon or derived from the Tribe's right of possession or occupancy.

Some later authorities, however, take a more extreme position that Indian tribes have the inherent authority to exclude non-members not only from Indian-owned lands but from non-Indian-owned lands as well; that is, from lands in which neither the tribe nor its members have the right of occupancy or possession. *See, e.g., Federal Indian Law, supra* at 439. The primary authority for this view is the Solicitor's Opinion of October 25, 1934, entitled "Powers of Indian Tribes" (55 I.D. 14, 50), and the cases cited therein. A review of the authorities upon which that opinion is based, however, reveals that this view is erroneous. The cases relied upon in the 1934 Solicitor's Opinion are *Buster v. Wright*, 135 F. 947 (8th Cir. 1905); *Morris v. Hitchcock*, 21 App. D.C. 565 (1903), *aff'd*, 194 U.S. 384 (1904); and *Maxey v. Wright, supra.*[4] Of particular significance is the fact that each of those cases involved questions respecting the inter-relationship of the treaty powers of the Five Civilized Tribes to tax or license non-members and to remove those who would refuse to pay the license or tax. *Buster v. Wright*, 135 F. at 949; *Morris v. Hitchcock*, 21 App. D.C. at 568-70; *Maxey v. Wright*, 58 S.W. at 808. These cases therefore did not turn upon the inherent authority of the Indian tribes involved to exclude non-members but instead upon the unique and expansive provisions contained in the treaties made with the Five Civilized Tribes.[5] *See Morris v. Hitchcock*, 194 U.S. at 389-

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[4] As indicated *supra, Maxey v. Wright* is, in fact, supportive of the position taken by the *amici* here.

[5] As was recognized in an Opinion of the Attorney General dated September 17, 1900

> Under the treaties with the Five Civilized Tribes of Indians no person not a citizen or member of a tribe, or belonging to the exempted classes, can be lawfully within the limits of the county occupied by these tribes without their permission, and they have the right to impose the terms upon which such permission will be granted.

Quoted in *Morris v. Hitchcock*, 194 U.S. at 391. *Accord* 23 Op. Atty. Gen. 214, 216 (1900).

91; *Buster v. Wright*, 135 F. at 951; *Maxey v. Wright*, 58 S.W. at 809-10. *See also* 23 Op. Atty. Gen. 528 (1901); 23 Op. Atty. Gen. 214 (1900); 17 Op. Atty. Gen. 134 (1881).

As the foregoing discussion indicates, any inherent authority on the part of a tribe to exclude non-Indians extends only to Indian-owned lands unless there is a provision in a treaty or federal law expanding that authority.[6] In the present case, then, the Crow Tribe has authority to exclude non-Indians only on Indian-owned land[7] unless a provision in a treaty of federal law can be found which expands the Tribe's authority to non-Indian owned land. Thus, with regard to the present case, the question to be resolved is whether there is a treaty provision or federal law which grants the respondent Tribe the power to exclude non-members from non-Indian owned lands within the reservation.

The court below cited Article II of the Treaty of 1868 (15 Stat. 649) as a treaty provision which expanded the Tribe's inherent authority. That Article, in relevant part, provides that

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[6] In more recent cases in which the power to exclude is integral to the decision of the court, Indian owned lands were directly involved (*Barta v. Oglala Sioux Tribe*, 259 F.2d 553, 554 (8th Cir. 1958); *Iron Crow v. Ogalalla Sioux Tribe of the Pine Ridge Reservation*, 129 F. Supp. 15, 24-25 (D.S.D. 1955), *aff'd*, 231 F.2d 89 (1956)), or the reservation involved was a "closed" reservation. *Compare Quechan Tribe of Indians v. Rowe*, 531 F.2d 408 (9th Cir. 1976) (Fort Yuma Reservation); *Ortiz-Barraza v. United States*, 512 F.2d 1176 (9th Cir. 1975) (Papago Indian Reservation); *Dodge v. Nakai*, 298 F. Supp. 17 (D. Ariz. 1969) (Navajo Reservation) *with* U. S. Department of Commerce, *Federal and State Indian Reservations and Indian Trust Areas* at 63 (Navajo Reservation), 66 (Papago Reservation) and 108 (Fort Yuma Reservation) (G.P.O. 1974).

[7] Therefore, the authority to regulate hunting and fishing by non-Indians, based on the right to exclude, would only extend to Indian-owned land.

> the United States now solemnly agrees that no persons, except those herein designated and authorized so to do . . . shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians. . . .

Reliance upon this provision for the Tribe's power to prohibit non-Indians from hunting upon non-Indian owned lands is misplaced.

The provisions cited by the court below obligated the United States to prohibit certain classes of people from residing or passing upon the reservation.[8] The subsequent history of the Crow Reservation indicates that this provision has been abrogated by Congress. Congress made inevitable that result when it opened up lands on the reservation for sale to non-Indians, and when it authorized the alienation of allotted lands, with the resulting establishment of predominantly non-Indian communities and construction of roads and highways on the non-Indian land. All of these events were clearly foreseeable and in fact actually contemplated by Congress when it embarked on the allotment approach to "civilizing" Indian tribes. In using this approach on the Crow Reservation, Congress determined that for all practical purposes the obligation the United States had undertaken under Article II of the Treaty of 1868 was to be nullified, at least with regard to land made available for non-Indian settlement. This result is consistent with the result in *Puyallup Tribe, Inc. v. Department of Game of Washington*, 433 U.S. 165, 174 (1977), where it was determined that the provisions of a treaty (10 Stat. 1132) granting "exclusive

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[8] Similar provisions are contained in a number of treaties made with other tribes. *See e.g.*, Treaty of October 14, 1864 (16 Stat. 707, Art. I); Treaty of June 9, 1855 (12 Stat. 951, Art. II); Treaty of July 3, 1868 (15 Stat. 673, Art. II); Treaty of January 22, 1855 (12 Stat. 927, Art. II); Treaty of April 29, 1868 (15 Stat. 635, Art. II).

use" and guaranteeing that no white men would be permitted to reside on the reservation were implicitly abrogated when most of the Indian lands of the reservation were subsequently alienated to non-Indians pursuant to congressional action.

In conclusion, neither the inherent power of Indian tribes to exclude non-members nor the treaty obligations assumed by the United States in Article II of the Treaty of 1868 are satisfactory authority for the power of the Tribe to prohibit or regulate hunting and fishing by non-Indians on non-Indian owned land within the reservation.

III. THE TRIBE'S CLAIM OF EXCLUSIVE HUNTING AND FISHING RIGHTS IN ALL PRESENT RESERVATION LANDS IS NOT VALID.

Although not relied upon by the court below, the Respondent tribe asserts that its claims in this case are "legally correct . . . because the Tribe's hunting and fishing rights are exclusive, and the Tribe has sole power to license them . . . ." Brief for the Crow Tribe in Opposition to Petition for Certiorari at 14. This argument is also incorrect. The Treaty of 1868 does not specifically grant the Crow Tribe the exclusive right to hunt and fish on the reservation created by it. It does, however, provide that the reservation was to be set aside for the Indians' "absolute and undisturbed use and occupation." Art. II, 15 Stat. 650. Even assuming that this provision is sufficient to create exclusive hunting and fishing rights, since lands within the reservation have pursuant to congressional enactment passed out of Indian ownership, the Tribe's rights to hunt and fish can no longer be considered to be "exclusive" in regard to those lands. *See Puyallup Tribe, Inc. v. Department of Game of Washington*, 433 U.S. at 174-76.

In *Puyallup Tribe, Inc.*, this Court, when confronted with a treaty provision similar to that involved here regarding "exclusive" use, found that because tribal lands had been alienated pursuant to congressional enactment "[n]either the Tribe nor its members continue to hold Puyallup River fishing grounds for their exclusive use. . . ." *Id.* at 174. The significance of *Puyallup Tribe, Inc.* with regard to the present case is that it unmistakably established that "exclusive" rights created by treaty—the basis asserted by the Tribe here—are effectively extinguished with the alienation of the lands to non-Indians. Therefore, there is no "exclusive" right existent under the 1868 Treaty which would authorize the Crow Tribe to prohibit or regulate hunting and fishing by non-Indians on non-Indian owned land.

IV. THE GENERAL ALLOTMENT ACT ABROGATED ANY AUTHORITY WHICH THE CROW TRIBE ORIGINALLY MIGHT HAVE HAD TO REGULATE HUNTING AND FISHING BY NON-INDIANS ON NON-INDIAN LAND.

The foregoing discussion demonstrates that the Crow Tribe is without authority to prohibit or regulate non-Indian hunting and fishing on non-Indian owned lands within the reservation. However, even assuming that the sources relied upon by the court below are a sufficient basis for such regulation, that authority was effectively abrogated by Congress when it enacted the 1887 General Allotment Act (24 Stat. 388) and other special allotment acts pursuant to the policy underlying the General Allotment Act.

The court below found that in enacting the General Allotment Act and the 1920 Crow Allotment Act (41 Stat. 751),

Congress intended only to qualify the Tribe's right to prohibit hunting and fishing on the reservation by resident non-Indians (although the court still held that such activities by non-Indian residents could be regulated by the Tribe). This narrow view of the intent of the General Allotment Act view is in error. A detailed analysis of the policy underlying the enactment of that legislation[9] reveals that the approach taken by the court below is overly restrictive.

As the court below recognized, "[s]ubstantial assimilation" was a goal of the General Allotment Act and the 1920 Crow Allotment Act. 604 F.2d at 1168. The policy of the federal government which was to be implemented by the operation of the General Allotment Act was the civilization of the Indian population. This policy was to be carried out primarily by education, allotment to Indians of lands in severalty, and the eventual destruction of tribal relations.[10] As pointed out in *United States v. Southern Pacific Transportation Co.*, 543 F.2d 676 (9th Cir. 1976), "[t]he idea [underlying the General Allot-

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[9] The 1920 Crow Allotment Act was one of the special allotment acts Congress passed from time to time in pursuance of the general policy underlying the General Allotment Act. *See* S. Rep. No. 219, 66th Cong., 1st Sess. at 5 (1919). Thus, in the Senate report on the Crow Allotment bill, it was stated, in relevant part, as follows: "It [the Crow Allotment bill] is in accordance with the policy to which Congress gave its adherence many years ago, and which found expression in the Dawes Act [General Allotment Act]". *Id.* at 5. In addition, a significant amount of acreage within the reservation was alloted to tribal members prior to enactment of the 1920 Crow Allotment Act directly pursuant to the General Allotment Act. *See* Department of the Interior—Office of Indian Affairs, *General Data Concerning Indian Reservations*, Table 4 at 6-7 (1929).

[10] *See, e.g.*, Report of the Secretary of the Interior (1885), pp. 25-28; Report of the Secretary of the Interior (1886), p. 4; Report of the Commissioner of Indian Affairs (1887), pp. IV-X; Report of the Secretary of the Interior (1888), pp. XXIX-XXXII; Report of the Commissioner of Indian Affairs (1889), pp. 3-4; Report of the Commissioner of Indian Affairs (1890), pp. VI, XXXIX; Report of the Commissioner of Indian Affairs (1891), pp. 3-9, 26; Report of the Commissioner of Indian Affairs (1892), p. 5; Report of the Secretary of the Interior (1894), p. IV.

ment Act] was to 'civilize' the Indian by forcing him to abandon tribal life and take up the ways of the white farmers. . . ." *Id.* at 694. As will be discussed in greater detail *infra*, in light of the general purposes underlying the General Allotment Act and the means chosen by Congress to effectuate those ends, it seems evident that Congress did not intend that non-Indians who settled upon surplus lands or alienated allotted lands would be subject to the regulatory authority of the tribe on those lands.

As early as 1880, bills were introduced in Congress which provided generally for the allotment of reservation lands to Indians.[11] In 1881 a bill substantially similar to the General Allotment Act (S. 1773) was debated extensively in the Senate.[12] From the outset of and throughout the debates respecting the 1881 bill, it was clearly understood by all the members of the Senate that the purpose of the bill was to civilize the Indian population of the country and this was to be accomplished in part by the dissolution of tribal relations.[13] For example, Senator Saunders stated early in the debates on S. 1173 as follows:

> Heretofore we have recognized the tribal relations. . . . But now a new order of things is about to be established, as I understand. The people of this country are in favor largely, in my opinion, of giving the Indians the rights of citizenship, of making them citizens, and requiring of them all that is required of others . . . .
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[11] *See* H. R. 5038, 46 Cong., 2nd Sess. (1880); S. 1773, 46th Cong., 3d Sess. (1880).

[12] *See United States v. Mitchell*, —— U.S. ——, 100 S.Ct. 1349, 1354, n. 4 (1980).

[13] *See e.g.*, XI Cong. Rec. 779 (Sen. Vest), 782 (Sen. Coke), 783-84 (Sen. Saunders), 785 (Senators Morgan and Hoar), 881 (Sen. Brown), 906 (Sen. Butler), 939 (Sen. Teller), 1003 (Sen. Morgan), 1028 (Sen. Hoar), 1064 and 1065 (Sen. Plumb), 1067 (Sen. Williams).

> I only wanted to say that I favor the principle of the bill, that I wish it to be known that I am in favor of dividing the lands up into severalty to these people, and in favor of the earliest possible breaking up of the tribal relation and making them citizens in every sense of the word.

XI Cong. Rec. 783-84.

As part of the effort to civilize the allottees, it was expressly provided in the bill that upon issuance of the patent for the allotment, the allottee was to become subject to the laws of the territory or state in which the allotment was situated.[14] What is significant about this provision for purposes of this case is that the allotment of lands and the resultant extension of state law was consistently equated with the dissolution of tribal affairs; that is, the extension of state jurisdiction was to result in the termination of tribal jurisdiction.[15] Thus, it was understood and intended that with the extension of state or territorial jurisdiction upon issuance of a patent, the tribal relations of the allottees were to be, in effect, terminated.[16]

The significance of the foregoing discussion to the present case is readily apparent. It is unreasonable to conclude that

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[14] *S. 1773, supra* at § 6. *See* XI Cong. Rec. 778-79 (Sen. Coke), 875 (Sen. Hoar), 878 (Sen. Coke), 1029 (Sen. Plumb), 1066 (Sen. Kerman), 1067 (Sen. Morgan).

[15] *See, e.g.*, XI Cong. Rec. 785 (Sen. Morgan), 875 (Sen. Hoar), 878 (Senators Hoar and Coke), 881 (Sen. Brown), 908 (Sen. Call), 939 (Sen. Teller), 1028 (Sen. Hoar), 1067 (Senators Edmunds and Williams). As Senator Hoar pointed out during the course of the debates on S. 1773

> An Act of Congress may undoubtedly take away that shield, may destroy the tribal relation, and very likely do what this statute in express terms undertakes to do—that is, subject the Indian to State law . . . .
>
> * * *
>
> So if you make an Indian subject to the law of the State, it is not by limiting or by extending the operation of that law; it is by taking away from the Indian the tribal character . . . .

XI Cong. Rec. 1028.

[16] *See e.g.* XI Cong. Rec. 875 (Sen. Hoar), 876 (Sen. Morgan).

Congress intended to terminate tribal authority over individual Indian allottees and at the same time subject non-Indian settlers to tribal jurisdiction. *Cf. Oliphant v. Suquamish Indian Tribe,* 435 U.S. at 203 (discussion respecting significance of 1854 Amendment to the Trade and Intercourse Act). Moreover, it is unlikely that Congress intended that non-Indians entering the reservation would be subject to tribal jurisdiction since the avowed purpose of the bill was, in part, the ultimate destruction of tribal government.[17] Nowhere in the debates on S. 1773 is there any mention or implication of an understanding that the incoming settlers would be subject to tribal jurisdiction.[18] If Congress had contemplated that tribal jurisdiction would extend to non-Indians, express mention would have certainly been made of such. To the contrary,

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[17] In addition, Congress intended that civilization of the Indian population would be facilitated in part by non-Indians who would settle upon the surplus and alienated allotted lands and would thus expose the allottees to the way of civilization. *See e.g.,* XI Cong. Rec. 876 (Sen. Morgan), 877 (Sen. Hoar). *See also* XVII Cong. Rec. 1762-63 (Senators Teller and Dawes); Report of the Secretary of the Interior (1891), p. VI; Report of the Commissioner of Indian Affairs (1891), pp. 46-47; Report of the Secretary of the Interior (1892), p. XXXIII. It would be incongruous for Congress at the same time to intend that the tribes exercise authority over the non-Indians on the fee patented lands.

[18] It must have been contemplated by Congress that the opening of the vast territories encompassed by the Indian reservations to eventual non-Indian settlement could lead to the development predominantly non-Indian towns and communities. In fact, to aid the efforts to settle the vast territories opened during this era, Congress enacted legislation permitting right-of-ways for highways to be established on Indian lands and the condemnation of individual Indian lands for public purposes. Act of March 3, 1901, 31 Stat. 1084, §§ 3 and 4, 25 U.S.C. §§ 311, 357.

Additionally, it is evident from the debates on S. 1773 and similar bills debated in later sessions that Congress knew and understood that after the 25-year alienation restriction had expired, much of the allotted lands would pass to non-Indian ownership. *See e.g.,* XI Cong. Rec. 783 (Sen. Teller), 882 (Sen. Brown), 934 (Sen. Hoar); XVIII Cong. Rec. 974 (Sen. Dolph). *See generally* Collins, *Implied Limitations on the Jurisdiction of Indian Tribes,* 54 Wash. L. Rev. 479, 506-07 (1979).

however, repeated references were made during the debates to making Indian allottees amenable to the laws which governed the incoming settlers.

Review of the legislative materials pertinent to subsequent versions of S. 1773 reveals that the underlying understanding evidenced in regard to that bill prevailed in Congress and thus was carried forth and enacted in the General Allotment Act.[19] For example, Representative Skinner, one of the sponsors of the General Allotment Act in the House of Representatives, stated as follows:

> This means that the tribal relations must be broken up; that the practice of massing large numbers of Indians on reservations must be stopped; that lands must be allotted in severalty. . . .
>
> . . . . Let him [the Indian] become a citizen of the United States and be taught by contact with the white man. And in addition thereto give him his land as is provided in this bill *and extend over him and his property the same protection that is accorded to white men.* . . .

XVIII Cong. Rec. 190-91 (emphasis added.) In addition, it was recognized in the Senate that the bill then before it (the General Allotment Act) had passed the Senate substantially in the same form as in previous sessions of Congress. *See, e.g.*,

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[19] *See e.g.*, XIII Cong. Rec. 3211 (Sen. Conger) and 3212 (Senators Conger and Dawes) (1882); XIV Cong. Rec. 2279-80 (Sen. Coke), 2280 (Senators Dawes and Call) (1884); XVII Cong. Rec. 1630 (Sen. Dawes), 1632 (Sen. Maxey), 1634-35 (Sen. Maxey), and 1762 (Sen. Teller) (1886); XVIII Cong. Rec. 190 (Rep. Skinner), and 191 (Representatives Skinner and Perkins) (1886).

Additionally, S. 1773 was similar to the General Allotment Act in most significant respects. In later sessions, bills essentially identical to the 1887 Act were debated in and passed by the Senate. *See United States v. Mitchell*, —— U.S. ——, 100 S.Ct. 1349, 1354 (1980); S. 1455, 47th Cong., 1st Sess. (1882); S. 48, 48th Cong. 2d Sess. (1883).

XVII Cong. Rec. 1558 and 1559 (Sen. Dawes), 1762 (Sen. Teller). As pointed out by Senator Dawes, the author of and one of the primary spokesmen for the General Allotment Act, "this is a very important bill in reference to the Indians. It has been considered, as I have already said, a great many times in the Senate." XVII Cong. Rec. 1559. Since the bill which was enacted in 1887 was viewed as essentially the same as that considered in earlier sessions and since the underlying assumptions regarding the cessation of tribal relations and the immediate extension of state laws to allottees were the same as in previous sessions,[20] it must be assumed that the intentions and understandings of Congress regarding tribal jurisdiction over non-Indians under earlier versions of the bill were, in effect, carried forth and enacted in 1887.

In light of the history just discussed, the State and Counties believe that the court below was far too narrow in its construction of the Congressional intent in passing the General Allotment Act. It appears that Congress not only contemplated that non-Indian residents would not be subject to tribal regulation on their own property, but that all non-Indians, resident and non-resident, would not be subject to tribal

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[20] Contemporaneous administrative materials respecting the General Allotment Act confirm that the underlying assumptions of Congress in enacting that Act was the same as in previous sessions. *See, e.g.*, Report of the Commissioner of Indian Affairs (1887), pp. VI, VIII-IX; Report of the Secretary of the Interior (1888), p. XXXI; Report of the Commissioner of Indian Affairs (1890), p. VI; Report of the Commissioner of Indian Affairs (1891), p. 6. Thus, as pointed out in the Report of the Secretary of the Interior for 1888,

> A beginning has already been made upon another line of policy, from which much appears justifiably to be hoped—the complete dispersion of the tribes and bands by the establishment of individuals as landowners and the investment of them with the dignity, rights and privileges of citizens in the State and nation.

Id. at XXXI.

regulation on all non-Indian owned lands within the reservation. The exercise of tribal sovereignty in the instant case would therefore be inconsistent with the overriding interests of Congress in opening reservations to non-Indian settlement. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 48 U.S.L.W. at 4673.

CONCLUSION

For all of the reasons discussed in this brief, the State and Counties urge that the judgment of the court below be reversed insofar as it grants the Crow Tribe authority to regulate or prohibit the hunting and fishing activities of non-Indians on non-Indian land within the Crow Reservation.

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